

FINAL REGULATION ORDER

Title 17, California Code of Regulations, Chapter 1,
Subchapter 1.25, Article 2.5 Administrative Procedures for Review of Executive Officer
Determinations Regarding Service Information for 1994 and Subsequent Model Year
Passenger Cars, Light-Duty Trucks, and Medium-Duty Engines and Vehicles and 2007
and Subsequent Model Year Heavy-Duty Engines

NOTE: This document is printed in a style to indicate changes from the existing provisions in title 17, California Code of Regulations, sections 60060.1 through 60060.34. All existing language is indicated by plain type. All proposed additions to language are indicated by underlined text. All proposed deletions to language are indicated by ~~strikeout~~.

Final Regulation Order

Title 17, California Code of Regulations, Chapter 1, Subchapter 1.25, reads as follows:

Article 2.5. Administrative Procedures for Review of Executive Officer Determinations Regarding Service Information for 1994 and Subsequent Model Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Engines and Vehicles and 2007 and Subsequent Model Year Heavy-Duty Engines

Subarticle 1. General Provisions

§ 60060.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, section 1969(c). The definitions set forth in Title 17, California Code of Regulations, section 60065.2 shall also be applicable to the extent that such definitions do not conflict with any terms as defined below. To the extent that any definition in section 60065.2 is applicable to these hearing procedures, any reference to a section within Article 3 that is set forth in that definition shall be read as the parallel section within this Article.

(b) The following definitions also apply:

(1) "Executive Officer" is the Executive Officer of the state board and employees of the state board authorized to represent the Executive Officer in the determination made pursuant to title 13, CCR, section 1969(j).

(2) "Interested Party" shall mean the covered person who filed the underlying request for audit that led to the issuance of a notice to comply.

(3) "Party" refers to the Executive Officer, ~~or~~ motor vehicle manufacturer or engine manufacturer appearing before a hearing officer in a hearing to review an Executive Officer determination against the motor vehicle manufacturer or engine manufacturer for noncompliance with Health and Safety Code section 43105.5 and title 13, California Code of Regulations section 1969 and also to an person whose motion to intervene has been granted pursuant to section 60060.8.

(4) "Request for Review" refers to the document requesting an administrative hearing that may be filed by a motor vehicle manufacturer, an engine manufacturer, or the Executive Officer.

(5) "Response" means a document that is responsive to the request for review filed by a party opposed to the review or the relief requested.

NOTE: Authority cited: Sections 39010, 39600, and 39601, Health and Safety Code. Reference: Part 5, (commencing with 39010) and Sections, 43105.5(e) and (f), Health and Safety Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 2. Hearing Officers

§ 60060.11. Authority of Hearing Officers.

(a) The hearing officer shall have authority to review matters arising under Health and Safety Code section 43105.5 and title 13, CCR, section 1969(k). Such authority shall include those matters in which:

(1) A motor vehicle manufacturer or engine manufacturer has contested a notice to comply that has been issued by the Executive Officer because the motor vehicle manufacturer or engine manufacturer has allegedly failed to comply with the provisions of section 43105.5 or the implementing regulations, title 13, CCR, section 1969;

(2) The Executive Officer has requested review and issuance of a compliance order against a motor vehicle manufacturer or engine manufacturer who has failed to request review of a notice to comply and has not filed a compliance plan as required by the notice to comply; and

(3) The Executive Officer has rejected a compliance plan submitted by a motor vehicle manufacturer or engine manufacturer pursuant to section 43105.5(e); and

(4) The Executive Officer has requested review and issuance of a compliance order against a motor vehicle manufacturer or engine manufacturer that has failed to comply with the terms of an approved compliance plan.

(b) Except as may be specifically limited in title 13, CCR, section 1969, in any matter subject to review pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, decisions, and

appropriate remedies, including penalties, as may be necessary for the full adjudication of the matter.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Sections 11181-11182 and 11425.30, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 4. Filing Requests for Administrative Hearing Review

§ 60060.15. Requests for Review by a Motor Vehicle Manufacturer or Engine Manufacturer.

(a) A motor vehicle manufacturer or engine manufacturer may file a request that a hearing officer review an Executive Officer determination to issue a notice to comply against the motor vehicle manufacturer or engine manufacturer, pursuant to Health and Safety Code section 43105.5(e) and title 13, CCR, section 1969(j).

(b) The motor vehicle manufacturer or engine manufacturer shall file the request for hearing within 30 days from the date that the Executive Officer issues a determination to issue a notice to comply. The hearing officer may, for good cause, extend the time for such filing.

(c) A failure to file a timely request for hearing of the Executive Officer's determination to issue a notice to comply, without alternatively serving on the Executive Officer a compliance plan as required by title 13, CCR, section 1969(j)(8), will result in the Executive Officer determination becoming final. The manufacturer's failure to pursue administrative review could subject the manufacturer to penalties pursuant to Health and Safety Code section 43105.5(f) and title 13, CCR, section 1969(l).

NOTE: Authority cited: Sections 39600 and 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections, 43105.5(e) and (f), Health and Safety Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.16. Requests for Review by the Executive Officer

(a) The Executive Officer shall file a request for hearing officer review and issuance of a compliance order when:

(1) The Executive Officer has issued a notice to comply against a manufacturer and the manufacturer has failed to either request administrative review of the determination, or, in the alternative, to submit a compliance plan as required under Title 13, CCR, section 1969(j)(8). The Executive Officer shall file the request for review within 30 days from the last day that the manufacturer had to file either a request for

review of the determination with the hearing office or submit a compliance plan to the Executive Officer.

(2) A motor vehicle manufacturer or engine manufacturer has submitted a compliance plan pursuant to Title 13, CCR, section 1969(j)(8), and the Executive Officer has determined pursuant to the procedures set forth in section 1969(j)(9) that the compliance plan is unacceptable. The Executive Officer shall file the request for review within 30 days from the date that he or she issues the determination.

(3) A motor vehicle manufacturer or engine manufacturer has had a compliance plan approved pursuant to Title 13, CCR, section 1969(j)(9) but has failed to comply with the terms of the plan.

(b) The hearing officer may, for good cause, extend the time for such filing.

NOTE: Authority cited: Sections 39600 and 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.17. Content of a Request for Review.

A request for review is not required to follow any particular form or format. But the request for review shall include all of the following.

(a) The signature of the requesting party or its designated representative.

(b) Copies of and specific reference to the respective determination of the Executive Officer that is the subject of the request for review (i.e., the notice to comply issued against the motor vehicle manufacturer or engine manufacturer, or the determination rejecting the motor vehicle manufacturer's or engine manufacturer's compliance plan).

(c) The correct business address of the requesting party and, if applicable, the name and address of the party's designated representative.

(d) The name and address of any interested party identified in the challenged determination.

(a) A statement of the circumstances or arguments that are the basis of the request for hearing, with specific reference to the evidence that was before the Executive Officer that supports such arguments.

(f) A statement of the proposed relief sought by the requesting party.

NOTE: Authority cited: Sections 39600 and 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code;

Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.18. Notice of Receipt of Request for Review.

(a) Upon receipt of a timely request for review, the hearing office shall review the request for completeness.

(b) If the request does not include the information required under section 60060.17, the hearing office shall immediately acknowledge receipt of the request and notify the requesting party of the deficiencies that must be corrected before the request for hearing may be deemed filed and docketed. The requesting party shall have 10 days from the date of mailing the notice of deficiencies to submit a complete request for hearing. If the deficiencies are not corrected within the 10 days or the time provided for initially filing the request in sections 60060.15 through 60060.16, whichever is later, the underlying Executive Officer determination will become final.

(c) If the hearing office finds the request for hearing to be complete, it shall deem the request filed on the date that the request was received and notify the requesting party, the Executive Officer, and any identified interested party that a request for hearing has been filed.

(d) Except as provided in paragraph (f) below, the notice shall inform the parties that:

(1) Copies of these hearing procedures are available from the hearing office and that the procedures set forth at Government Code section 11500 et seq. are not applicable.

(2) Interested parties may file a motion to intervene pursuant to these rules if they wish to participate in the hearing.

(3) The parties shall submit to the hearing office responsive and reply arguments by the dates specified in these procedures.

(4) The parties have the right to be represented by counsel or other representative of their choosing and the right to an interpreter or other necessary accommodation.

(e) Upon being informed that the request for review is complete, the Executive Officer shall forward to the hearing officer, within 15 days from the date of service, a certified copy of the Executive Officer determination that is the subject of the request for review and the investigative record that was compiled during the Executive Officer's investigation.

(f) In those matters in which the Executive Officer has requested review of his or her determination to issue a notice to comply because the manufacturer has failed to

contest the notice or, in the alternative, submit a compliance plan, the notice shall inform the parties that no hearing on the merits of the underlying Executive Officer determination will be held. Instead the notice shall inform the parties that the hearing officer will issue a compliance order against the motor vehicle manufacturer or engine manufacturer within 30 days of receipt from the Executive Officer of a certified copy of the Executive Officer determination and investigative record.

Note: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Part 5, Health and Safety Code; Section 11425.10, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.22. Stays Pending Issuance of Hearing Officer's Decision.

Pending the hearing officer issuing its decision, a motor vehicle manufacturer or engine manufacturer contesting an Executive Officer determination to issue a notice to comply or to reject a compliance plan submitted in response to a notice to comply shall not be required to take any action in response to the challenged Executive Officer determination.

Note: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 5. Pre-Hearing Procedures

§ 60060.29. Conduct of Hearings.

(a) All hearings shall be presided over by a hearing officer who shall conduct a full and fair hearing in which all parties have a reasonable opportunity to be heard and to present evidence.

(b) All hearings shall be conducted in the English language, although any party may request the assistance of an interpreter.

(c) In matters brought before the hearing officer pursuant to a request for review filed by the Executive Officer under section 60060.16(a)(1), no hearing on the merits of the underlying Executive Officer determination issuing a notice to comply shall be held. At the hearing officer's discretion, the hearing officer may issue an order to comply without convening a formal hearing.

(d) For all other hearings, subject to reasonable limitations that may be imposed by the hearing officer, each party to the proceeding shall have the right to:

(1) Call and examine witnesses.

(2) Introduce exhibits.

(3) Question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations.

(4) Impeach any witness regardless of which party first called the witness to testify.

(5) Call and examine an opposing party as if under cross-examination, even if that party has not testified on its own behalf.

(e) The burden of proof and of going forth with evidence in hearings covered by paragraph (c) shall be as follows.

(1) In all hearings for the review of Executive Officer determinations to issue a notice to comply against a motor vehicle manufacturer or engine manufacturer, to reject a motor vehicle manufacturer's or engine manufacturer's compliance plan, or to seek enforcement of a motor vehicle manufacturer's or engine manufacturer's failure to comply with the terms of an approved compliance plan, the burden of proof and of going forward shall be on the Executive Officer.

(2) At the conclusion of Executive Officer's case-in-chief, the motor vehicle manufacturer or engine manufacturer has the burden of producing evidence to show that no basis exists to support the Executive Officer determination that is under review.

(3) At the close of the motor vehicle manufacturer's or engine manufacturer's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (f)(1) below.

(f) The hearing officer may:

(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement;

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence;

(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;

(5) Restrict attendance because of the physical limitations of the hearing facility; or

(6) Take other action to promote due process or the orderly conduct of the hearing.

(g) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(h) The hearing officer shall base its decision as to whether a motor vehicle manufacturer or engine manufacturer is not in compliance or whether the Executive Officer properly rejected a manufacturer submitted compliance plan upon a preponderance of the evidence.

(i) Hearings shall be recorded electronically or by a court reporter. The record made by the Administrative Hearing Office shall be the official record of the hearing.

(1) A verbatim transcript of the official recording will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every other party.

(2) The official record of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

Note: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Sections 11455.30 and 11525, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 8. Decisions of the Hearing Officer

§ 60060.32. Decisions and Orders of the Hearing Officer.

(a) Except for compliance orders issued pursuant to or after a request for hearing filed under section 60060.16(a)(1) or otherwise ordered, all proceedings shall be submitted at the time identified by the hearing officer in the schedule for review that has been served upon the parties. Within 30 days of the matter being submitted, the hearing officer shall make findings upon all facts relevant to the issues under review, and file a written decision and order setting forth the reasons or grounds therefore.

(b) If the decision finds that the motor vehicle manufacturer or engine manufacturer has failed to comply with any of the requirements of Health and Safety Code section 43105.5 or title 13, CCR, section 1969, including the obligation to submit an acceptable compliance plan, the decision shall order the motor vehicle manufacturer

or engine manufacturer to come into compliance within 30 days of the effective date of the decision.

(1) The order shall further provide that if the motor vehicle manufacturer or engine manufacturer fails to comply within the 30-day time period set forth above, the hearing officer may order that the motor vehicle manufacturer or engine manufacturer be assessed penalties in an amount not to exceed \$25,000 per day per violation, commencing on the 31st day of noncompliance and continuing until the violation is corrected.

(2) For purposes of this section, a finding by the hearing officer that a motor vehicle manufacturer or engine manufacturer has failed to comply with the requirements of Health and Safety Code section 43105.5 and title 13 CCR, section 1969 et seq., including the failure to submit a timely compliance plan, shall be considered a single violation.

(c) A compliance order issued pursuant to a request for review filed under section 60060.16(a)(1) shall be in writing and issued within 30 days from the date the hearing officer notified the parties that it is in receipt of the documents forwarded by the Executive Officer. The order shall require that the motor vehicle manufacturer or engine manufacturer, within 30 days from the date of the order, correct the noncompliance identified by the Executive Officer in its notice to comply. The hearing officer may order the assessment of penalties for continuing noncompliance after the 30-day grace period consistent with the provisions of paragraphs (b)(1) and (2) above.

(d) The decision or order of the hearing officer is the final decision of the ARB and is effective on the date of issuance.

(e) A copy of the decision or order shall be served on each party or representative.

(f) Within five days of the filing of any decision or order, a party may file a written request that the hearing officer correct a mistake or clerical error.

(1) Pursuant to the party's request or on the hearing officer's own motion, the hearing officer may issue a revised decision or order correcting a mistake or clerical error with respect to any matter respectively covered therein. If the hearing officer makes such a determination, he shall provide written notice to the parties.

(2) A motion filed by a party under this subparagraph shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request. In such a case, the decision shall become effective 15 days after the motion was filed.

(3) Within 15 days notifying the parties of his or her intent to modify the decision or order, the hearing officer shall serve a copy of any modified decision or order on each party that had previously been served with the original. The modified

decision or order shall supersede the previously served document. The date of service of the modified decision or order shall become the effective date of the document.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Section 11425.50, Government Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

§ 60060.33. Penalty Assessment

In determining the appropriate conditional daily penalties that a motor vehicle manufacturer or engine manufacturer may be subject to under Health and Safety Code section 43105.5(f) and these regulations, the hearing officer shall consider the following factors.

- (a) The extent of noncompliance by the motor vehicle manufacturer or engine manufacturer.
- (b) The harm caused by the noncompliance to the covered person and other persons, as well as any violations to public health and safety and to the environment.
- (c) The nature and persistence of the noncompliance.
- (d) The compliance history of the motor vehicle manufacturer or engine manufacturer, including the history of past noncompliance.
- (e) The efforts made to comply, and any special circumstances preventing or delaying compliance.
- (f) The cooperation of the motor vehicle manufacturer or engine manufacturer during the course of the Executive Officer's investigation.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Section 43105.5 Health and Safety Code; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.

Subarticle 9. Judicial Review

§ 60060.34. Judicial Review.

(a) Except as provided in paragraph (b) below, a party adversely affected by the final decision of the hearing officer may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. Such petition shall be filed within 30 days after the order or decision becomes final.

(b) A motor vehicle manufacturer or engine manufacturer adversely affected by a compliance order issued pursuant to section 60060.33(a) may only request judicial

review of a penalty assessment and not the merits of the underlying notice to comply, which the manufacturer never itself contested.

(c) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.

NOTE: Authority cited: Sections 39600, 39601, 43105.5(e) and (f), Health and Safety Code. Reference: Sections 43105.5(e) and (f), Health and Safety Code; Section 1094.5, California Code of Civil Procedure; Section 1969, title 13, California Code of Regulations; and Mathews v. Eldridge (1976) 424 U.S. 319.